February 10, 1973, Lord Denning pointed out as follows: —

"It is important to realise that there is a difference between an *award for loss of earnings* and *compensation for loss of earning capacity*. Damages for loss of future earnings are for real assessable loss sufficiently provable by evidence. For loss of *earning capacity* compensation is given by way of general damages".

The instant case is pre-eminently a claim for loss of earnings, readily assessable according to the evidence.

We would allow this appeal, reduce the award of damages to $26,642.15, with interest thereon at 6% per annum from date of judgment in the court below till satisfaction. The $4,500 paid into court by the defendants will be released to the plaintiff's solicitors. As to costs, we think that the best practical solution would be to order that the costs of this appeal be set off against the costs of the action, leaving a balance in favour of the plaintiff, which we would assess at $1,000. The appellants' deposit of $500 will be paid out to the plaintiff's solicitors towards the said sum of $1,000 due as balance of costs after set-off.

Appeal allowed.

Solicitors: *Richard Talalla & Co.; Inderjit Singh.*

AHMAD ISMAIL v. MALAYA MOTOR COMPANY & ANOR.

[F.C. (Azmi L.P., Suffian and Ong Hock Sim F.JJ.)
May 25 1973]
[Kuala Lumpur — Federal Court Civil Appeal No. 119 of 1972]

Hire Purchase — Hire purchase agreement superseding sale by car dealer — Implied term — Anticipatory breach — Seizure of car by police — Hire Purchase Act, 1967, s. 6(1)(b).

The appellant had agreed to buy a secondhand car from the first respondent, a car dealer. The appellant turned in his own car and paid a deposit, promising to pay the balance later. He then arranged with the second respondent, a finance company, for the hire purchase of the car to him. Subsequently the car was detained by the police on suspicion that it had been stolen. The appellant sued both respondents for breach of contract. The claim was dismissed in the Sessions Court and an appeal to the High Court was also dismissed ([1973] 1 M.L.J. 117). The appellant thereupon appealed to the Federal Court.

Held, dismissing the appeal: (1) the sale agreement in this case between the car dealer (first respondent) and the appellant was superseded by the hire purchase agreement and therefore the appellant has no claim against the first respondent;

(2) there was no proof that the seller or owner of the car had no title to the car in this case, as there was only a suspicion that the car had been stolen and the car was in fact eventually returned by the police to the second respondents;

(3) there was no anticipatory breach of contract in this case as there had been no act by the second respondent which made performance of the contract impossible. If performance had been made impossible, it was not because of the act of the second respondent but because of the intervention of the third party, the police.

Cases referred to:-

(1) *Warman* v. *Southern Counties Car Finance Cpn. Ltd.* [1949] 1 All E.R. 711, 714.

(2) *Universal Cargo Carriers* v. *Citati* [1957] 1 All E.R. 70.

(3) *Heyman* v. *Darwins Ltd.* (1942) 1 All E.R. 337, 359.

(4) *Hochster* v. *De La Tour* 118 E.R. 922.

FEDERAL COURT.

Raja Abdul Aziz bin Raja Addruse and *Wan Ariff bin Wan Hamzah* for the appellant.

Tara Singh Sidhu for the first respondent.

Chow Sing Yau for the second respondent.

Suffian F.J. (delivering judgment of the court): On December 18, 1969, the plaintiff (appellant here) decided to buy a secondhand Morris car bearing registration No. BW343 from the first defendant, a car dealer (first respondent) for $4,900. The plaintiff turned in his own car, for which he was given a credit of $1,200. He also paid the first defendant $1,000 cash. He had to find another $2,700. As to this, it was agreed that it should be settled on or before 19th December, 1969, in default of which the deposit of $1,000 cash would be forfeited.

Since the plaintiff had no money to pay for the balance, he was introduced by the car dealer to the second defendant, a finance company (second respondent), as a result of which the plaintiff entered into a hire purchase agreement (Exhibit P3) with the finance company on December 19, under which the finance company was referred to as the "owners" of the Morris car and the plaintiff as the "hirer". Under the agreement the plaintiff was to pay the second defendant monthly instalments of $150 beginning on 19th January, 1970. The plaintiff paid four monthly instalments. He stopped doing so when the car was detained by the police on 30th April, 1970, on suspicion that it had been stolen.

During the course of police investigations the police offered to return the car to the plaintiff subject to conditions. The plaintiff acting on legal advice refused to accept the offer. On 4th July, 1970, the plaintiff through his solicitors terminated the hire purchase agreement by letter (Exhibit P5), the relevant particulars of which read as follows:

"We are instructed that under the abovementioned Hire Purchase Agreement, our client bought by hire purchase one motor vehicle Morris model No. 1000 Registration No. BW343 at a price of $5,820.00. We are further instructed that on the 19th day of December, 1969, our client paid you a deposit of $2,220.00 and that the balance of $3,600.00 was agreed to be paid by 24 instalments of $150.00 per month.

X X X X X

PLEASE TAKE NOTICE we are instructed to and we do hereby terminate the Agreement referred to above by virtue of breach of condition and warranty on your part in that you have no title to the said motor vehicle. The deposit ($2,220.00) and the four months instalments (amounting to $600.00) were paid to you for no consideration. Our client is therefore entitled to a refund of the sum of $2,830.00. Further, as a result of the breach on your part, our client suffered special damages amounting to $350.00. We hereby demand from you the total sum of $3,170.00 payable to our client within 14 days from the date hereof failing which our instruction is to take proceedings against you without further notice."

On 10th September, 1970, the plaintiff sued both defendants for damages for breach of contract. He alleges that there had been breach of the condition implied by section 6(1)(b) of the Hire Purchase Act, 1967, which reads as follows:

"In every hire purchase agreement there shall be an implied condition on the part of the owner that he shall have a right to sell the goods at the time when the property is to pass."

On 31st October, 1970, the second defendant took possession of the car from the police on condition that they should not offer the car for hire or sale to any one, that they should not sell or transfer it without leave of the court, that they should not alter, change or substitute any part of the car, and subject to other conditions.

The learned President on 18th December, 1971, dismissed the claim against the first defendant, holding that after the plaintiff had gone to the finance company, the car dealer faded out of the picture and there ceased to be any contractual relationship between him and the plaintiff.

The learned President also dismissed the claim against the finance company on the ground that there was no proof that the car had been stolen (this was agreed by counsel before him) and therefore there had been no breach by the finance company of the condition implied by section 6(1)(a).

The plaintiff appealed to the High Court, which dismissed his appeal.

He has now appealed to us.

The questions to be determined in this appeal are as follows. After the execution of the hire-purchase agreement between the plaintiff and the finance company did there remain any contractual relationship between the plaintiff and the car dealer so that the plaintiff has a claim against him? As between the plaintiff and the finance company, did the seizure by the police of the car in the particular circumstances of this case constitute a breach of the implied condition under section 6(1)(b) by the finance company so as to entitle the plaintiff to rescind the hire-purchase agreement and claim damages for that breach?

The first ground of appeal concerns only the first defendant. It is said that the learned appellate judge was wrong in holding that there remained no contractual relationship between the plaintiff and the first defendant. It is said that despite the existence of the hire-purchase agreement there still remained a contractual relationship between the two of them and that the learned appellate judge should have held that the first defendant had only assigned his rights in the car to the finance company.

We regret we cannot accept this argument. It is true that by exhibits P1 and P2 there was a sale by the car dealer of the car to the plaintiff on certain conditions. But ultimately these documents were superseded by the hire-purchase agreement exhibit P3 and from the language of this document it is plain that the car dealer completely faded out of the picture and the only contract that remained then was between the plaintiff and the finance company, and accordingly the plaintiff has no claim against the car dealer.

The other grounds of appeal concern only the finance company. Against them it is first argued as follows: that "the essential part of [a hire-purchase] agreement is that the hirer has the option to purchase [the subject matter of the agreement], and it is common knowledge ... that when people enter into a hire-purchase agreement they enter into it not only for the purpose of hiring, but also for the purpose of purchasing ... If at any stage the option to purchase goes, the whole value of the agreement to the hirer goes with it." (per Finnemore J. in *Warman's* case[1]); that under section 6(1)(b) there was an implied condition on the part of the finance company that they would have a right to sell the car at the time when the property in it was to pass; that the property in it was to pass after the final instalment had been paid *or* after the plaintiff (if he had opted to do so) had given notice under section 13(1) before the date for the final instalment that he intended to complete the purchase by paying the net balance due under the agreement; and that when the police seized the car as a suspected stolen car there was no actual breach by the finance company of the implied condition, but nevertheless there was *anticipatory* breach by them, entitling the plaintiff to rescind the agreement and sue for damages for breach.

Universal Cargo Carriers[2] is cited as authority for this. Speaking of anticipatory breach, Devlin J. as he then was said at pages 84-5:

"The law on the right to rescind is succinctly stated by Lord Porter in *Heyman* v. *Darwins Ltd.*[3] at page 359 as follows:

'The three sets of circumstances giving rise to a discharge of contract are tabulated by [Anson's Law of Contract, 20th edition, page 319] as: (i) renunciation by a party of his liabilities under it; (ii) impossibility created by his own act; and (iii) total or partial failure of performance. In the case of the first two the renunciation may occur or impossibility be created either before or at the time for performance. In the case of the third, it can occur only at the time or during the course of performance.'

The third of these is the ordinary case of actual breach and the first two state the two modes of anticipatory breach ...

....

Suppose, for example, that a man promises to marry a woman on a future date, or to execute a lease, or to deliver goods; and that before the day arrives he marries another, or executes the lease in favour of another, or delivers the goods to a third party. The aggrieved party may sue at once. Lord Campbell C.J. observed in *Hochster* v. *De la Tour*:[4]

'One reason alleged in support of such an action is, that the defendant has, before the day, rendered it impossible for him to perform the contract at the day; but this does not necessarily follow; for prior to the day fixed for doing the act, the first wife may have died, a surrender of the lease executed might be obtained, and the defendant might have repurchased the goods so as to be in a situation to sell and deliver them to the plaintiff.'

But if the plaintiff treats the defendant's conduct as amounting to renunciation and justified his rescission on that ground, the defendant could not avail himself of this defence."

On behalf of the finance company it is submitted that in all the cases cited on behalf of the plaintiff there was proof that the seller or owner had no title to the goods in question, whereas here there was only a suspicion that the car had been stolen, that during the course of these proceedings there was only an assump-

tion that there was no proof that the car had been stolen, but finally the police cancelled the conditions subject to which the car had been returned to the finance company, that the option by the plaintiff to complete the sale early under section 13 was only hypothetical and that if he had continued to pay all his instalments the company would have been able to pass the title to him.

With respect we cannot accept the plaintiff's arguments. In our view the principle enunciated in *Universal Cargo Carriers, supra,* does not apply. The principle there is that anticipatory breach of a contract can occur only if there has been some act by the *defendant* himself to make it obvious that he has renounced his liabilities under the contract or that it has become impossible for him to perform. Here on the other hand there has been no such act by the second defendant. If performance has been made impossible it was not because of their act but because of the intervention of a third party, the police.

We would therefore dismiss this appeal with costs.

Appeal dismissed.

Solicitors: *Rithauddin & Aziz; Khoo & Sidhu; Chye, Chow, Chung, Tang & Co.*

JAYANATHAN v. PUBLIC PROSECUTOR

[F.C. (Azmi L.P., Suffian & Ong Hock Sim F.JJ.)

May 31, 1973]

[Johore Bahru — Federal Court Criminal Reference No. 5 of 1973]

Criminal Law and Procedure — Provision that a person guilty of an offence "shall be liable to imprisonment for a term not exceeding 5 years and not less than 2 years" — Whether imprisonment mandatory — Whether accused can be bound over under s. 294 of the Criminal Procedure Code (F.M.S. Cap. 6).

Prevention of Crime Ordinance, 1959, s. 15(4) — Whether overrules s. 294, Criminal Procedure Code (Cap. 6) — Whether imprisonment mandatory — Discretion.

In this case the following question of law was referred to the Federal Court:

> "Whether the provision of section 15(4) of Prevention of Crime Ordinance, 1959 overrules the provision of section 294 of the Criminal Procedure Code in so far as an offence against section 15 of the Prevention of Crime Ordinance is committed".

Under section 15(4) of the Prevention of Crime Ordinance a person found guilty of an offence "shall be liable to imprisonment for a term not exceeding 5 years and not less than 2 years". The accused in this case had pleaded guilty to a charge of contravening a restriction order imposed on him under the Ordinance and the President of the Sessions Court had bound him over in the sum of $1000 in one surety under section 294 of the Criminal Procedure Code. The High Court acting in revision set aside the order of the learned president and substituted a sentence of two years' imprisonment.

Held: (1) the provision of section 15(4) of the Prevention of Crime Ordinance does not overrule the provision of section 294 of the Criminal Procedure Code in so far as an offence against section 15 of the Ordinance is committed;

(2) the words "shall be liable" in section 15(4) of the Prevention of Crime Ordinance do not make the term of imprisonment mandatory and the learned president was therefore entitled to act under section 294 of the Criminal Procedure Code and bind over the accused.

Cases referred to:-

(1) *Public Prosecutor* v. *Hew Yew* [1972] 1 M.L.J. 164.

(2) *Public Prosecutor* v. *Man bin Ismail* [1939] M.L.J. Rep. 161; [1939] M.L.J. 207.

FEDERAL COURT.

Datuk Sri S. P. Seenivasagam for the applicant.

Gunn Chit Tuan (Senior Federal Counsel) for the respondent.

Ong Hock Sim F.J. (delivering judgment of the court): On May 6, 1973, we dealt with a reference to us under section 66 of the Courts of Judicature Act, 1964 reserving for the determination of this court a question of law of public interest, namely:

> "Whether the provision of section 15(4) of Prevention of Crime Ordinance, 1959 overrules the provision of section 294 of the Criminal Procedure Code in so far as an offence against section 15 of the Prevention of Crime Ordinance is committed."

We answered this question in the negative. Pursuant thereto and sub-section (5) of section 66, we set aside the order in revision of the learned judge and restored the order of binding over by the learned president. We said then we would give our reasons later. This we now do.

In this case, the applicant had pleaded guilty to a charge of contravening a restriction order imposed on him under section 15 of the Prevention of Crime Ordinance (No. 13 of 1959). The learned president bound him over in the sum of $1,000 in one surety under section 294 of the Criminal Procedure Code. The time for appeal having lapsed, the learned Deputy Public Prosecutor applied for revision of this order to the High Court on the ground that "the learned president erred in law in imposing a sentence of binding over when section 15(4) of the Ordinance clearly states "shall be liable to imprisonment for a term not exceeding five years and not less than two years".

Section 15(4) reads:

> "A registered person who contravenes or fails to comply with any order or restriction imposed on him under this section shall be guilty of an offence and *shall be liable* to imprisonment for a term not exceeding five years and not less than two years."

This section was construed by the learned judge in *Public Prosecutor* v. *Hew Yew*[1] where he reviewed certain authorities on the words "shall be liable" therein. They show that where provisions of law provide for a term of imprisonment or an amount by way of fine, the courts have a discretion to impose a term of imprisonment or fine not exceeding the maximum prescribed. This is in accord with section 60 of the Interpretation Act which reads:

> "60. A written law which prescribes a penalty for an offence shall be construed as providing that the offence shall be punishable on conviction by a penalty not exceeding the penalty prescribed."

He further said:

> "In the context of section 15(4) of the Prevention of Crime Ordinance the words are